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IN THE SUPREME COURT OF THE UNITED STATES

SUSAN POOLE, Warden, *Petitioner,*

v.

GLORIA KILLIAN, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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ARGUMENT

I.

THE PETITION IS NOT MOOT

In her Brief in Opposition, Killian contends the petition is moot. (Opp. at 10.) It is not.

A. Killian's Release From Custody, In Accordance With The Ninth's Circuit's Opinion, Does Not Render The Case Moot

Killian's first argument in support of mootness is an amalgam of arguments involving the fact of Killian's release from custody. That Killian has been released from prison pursuant to the judgment of the Ninth Circuit does not render the case moot. Killian was sentenced to a term of 32 years to life in prison for murder, and has yet to serve that full term. The very judgment of the Ninth Circuit which ordered Killian's release is the judgment upon which Petitioner is seeking certiorari review. If that judgment is reversed by this Court, Petitioner will seek to return Killian to prison to serve the remainder of her term. In *Calderon v. Moore*, 518 U.S. 149, 150 (1996), the Ninth Circuit had dismissed a merits appeal by the State as moot because the district court had ordered the habeas petitioner released, and the state had begun preparing for a new trial. This Court held in no uncertain terms that the case was not moot because, if the State was successful in its merits appeal, the Court of Appeals could grant the State "any effectual relief whatever" and save the State the burden of a new trial. *Id.* at 150-151. Presumably included in the type of relief available was an order to return the habeas petitioner to custody.

Killian's reference to the "case or controversy" requirement of Article III (*see* Opp. at 13) does not aid her argument. That requirement "subsists through all stages of federal judicial proceedings, trial and appellate. . . . The parties

must continue to have a 'personal stake in the outcome' of the lawsuit." *Spencer v. Kemna*, 523 U.S. 1, 7 (1997) quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477-478 (1990). As this Court noted in *Spencer*, however, the conditions satisfying the case or controversy requirement have relaxed over the years. 523 U.S. at 7-9. This Court now accepts "the most generalized and hypothetical of consequences as sufficient to avoid mootness." *Id.* at 10. If the judgment of the Ninth Circuit is reversed, Killian faces the prospect of a return to prison to serve the remainder of her term. This consequence is far from hypothetical, and serves to defeat Killian's claim of mootness.

Killian cites inapposite authority in support of her contention that her release renders the petition moot. (Opp. at 12-13.) *Burton v. Johnson*, 975 F.2d 690, 693-694 (10th Cir. 1992) is inapplicable because in that case, the state failed to appeal the judgment ordering the habeas petitioner's release. In this case, the state is seeking review of the Ninth Circuit opinion granting the writ. Killian's cursory claim that the State may not simply take her into custody (*see* Opp. at 14) is rebutted by the very authority cited in her brief. *Calderon*, 518 U.S. at 150.

B. Because The Ninth Circuit's Opinion Contains No Discernible Holding Regarding The Non-Disclosure Claim, Reversal On The Grounds Urged By Petitioner Will Permit A Favorable Result Upon Remand

In a related argument in support of the claim of mootness, Killian contends that even if this Court grants certiorari review and reverses on the questions presented in the petition, the judgment would remain the same. (Opp. at 14.) According to Killian, the Ninth Circuit ruled that she was "separately and independently entitled to habeas relief because the state court's denial of her non-disclosure claim was based on an 'unreasonable application' of clearly established federal law." *Id.* The flaw in this argument is that the Ninth Circuit made no such ruling.

The Ninth Circuit's determination that habeas relief was warranted was based on a determination that there was cumulative error. (Pet.App.A at 13.) In its discussion of the three individual claims of error, the court never stated that habeas relief was warranted. Indeed, a careful reading of the Ninth Circuit's analysis of the non-disclosure claim reveals that it is doubtful there was any holding as to the claim at all. (*See* (Pet.App.A at 9-11.) The analysis begins with a citation to *Brady v. Maryland*, 373 U.S. 83 (1963). However, the court focused on three undisclosed letters, one of which was not in existence at the time of trial. (*See* Pet.App.A at 10-11, n.8.[1]) The court then "considered collectively" the three letters. (Pet.App.A at 10.) It focused primarily on the statements contained in the letter that was not written by Masse until after Killian's trial. *Id.* at 10-11.[2]

At this point, however, the analysis by the Ninth Circuit necessarily changed course, undoubtedly due to the court's realization that *Brady* error could not be premised on evidence which did not exist until after trial had concluded. "*Brady* identifies a trial right." *Newsome v. McCabe*, 256 F.3d 747, 752 (7th Cir. 2001). As the court observed in *United States v. Sanchez*, 251 F.3d 598, 603 (7th Cir. 2001), "because the government cannot suppress evidence that does not exist at the time of the trial, there is no *Brady* violation" regarding evidence arising after trial. Similarly, in *United States v. Lord*,

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1. One of the two letters in existence at trial was determined by the district court to be simply a record of the prosecutor's intentions, undisclosed to anyone, and therefore not subject to *Brady* at all. (Pet.App.D at 31-33, 44-45.)

2. The Ninth Circuit opinion contains only selective quotes from the letter (*see* Pet.App.A at 10) which are taken grossly out of context. A complete quote appears at Pet.App.D at 19, n.17. Notable in its absence from the Ninth Circuit's selective quotations is Masse's statement in the letter that "I been up front and honest as I could be. . . ." *Id.*

710 F. Supp. 615, 619 (E.D.Va. 1989), the court found that the *Brady* duty to disclose continues only until the day of sentencing. In fact, this Court has stated that *Brady* "involves the discovery, after trial, of information which had been known to the prosecution but unknown to the defense." *United States v. Agurs*, 427 U.S. 97, 103 (1976). Because it is not at all clear that the *Brady* obligation continues after trial has concluded, or applies to evidence that comes into the possession of the prosecution after trial, the Ninth Circuit's opinion, based as it was on all three letters, could not properly complete the *Brady* analysis it had begun.

Presumably, the Ninth Circuit recognized this fact, which explains why their analysis concluded simply with a statement that the state courts and district court were wrong, without stating that the error warrants reversal. Pet.App.A at 11. In the cumulative error section, the opinion is even less clear. The court observed that "[e]ven if [the three individual errors] were not each sufficient to justify habeas relief, we note that if ever there were a case for application of cumulative error principles, this is it." Pet.App.A at 13. The opinion goes on to state that based on cumulative error, a new trial is warranted. *Id.* The qualifier "even if" used in the quoted sentence is telling, because it suggests uncertainty about whether the individual claims, including the non-disclosure claim, were sufficient alone to warrant habeas relief. More telling is the fact that nowhere in the opinion did the Ninth Circuit ever state that any of the individual claims warrant habeas relief. Language granting reversal and a new trial appears only in the cumulative error section.

It must be remembered that the party asserting mootness bears a heavy burden of demonstrating that there is no effective relief the court can provide. *Cardinal Chemical Co. v. Morton International, Inc.*, 508 U.S. 83, 98 (1993); *Seven Words LLC v. Network Solutions*, 260 F.3d 1089, 1095 (9th Cir. 2001). Given the lack of a holding that the non-disclosure claim independently warranted habeas relief, Killian cannot carry her burden.

If certiorari is granted and Petitioner is successful, then, upon remand, Petitioner can prevail in the Ninth Circuit, because the Ninth Circuit would have to determine whether the non-disclosure claim, standing alone, would warrant habeas relief. Moreover, if the Ninth Circuit attempted to rely on the post-trial letter to find a *Brady* violation, it would again be in violation of *Teague v. Lane*, 489 U.S. 288, 308-10 (1989), because this Court has never stated that the *Brady* obligation, including all of the appropriate remedies, continues post-trial. In sum, upon remand, the Ninth Circuit would be forced to conduct an altogether different calculus, which could certainly change the result. Therefore, the petition is not moot because Killian may well find herself subject to the state court judgment of conviction in the future.

II.

THE NINTH CIRCUIT ANNOUNCED A NEW RULE OF LAW IN VIOLATION OF *TEAGUE*

Killian contends that the Ninth Circuit implicitly rejected *Teague* by citing prior decisions of this Court. (Opp. at 17.) It is generally correct that an opinion relying upon decisions from this Court which predate finality will not run afoul of *Teague v. Lane*, 489 U.S. 288. However, the decisions cited by the Ninth Circuit do not support their novel rule of law. The fact that the decision below cited authority from this Court is irrelevant if those cited decisions do not support the rule announced by the Ninth Circuit.

The rule of law in question is the Ninth Circuit's conclusion that perjured testimony by a prosecution witness, without any finding that the prosecutor knew or should have known of the perjury, amounts to constitutional error. The Ninth Circuit decision opened its discussion of the perjury claim with a citation to *Agurs*, 427 U.S. at 103 for the settled proposition that the knowing use of perjured testimony warrants reversal. (Pet.App.A at 6.) Later in the same paragraph, the

Ninth Circuit cited *United States v. Young*, 17 F.3d 1201, 1204 (9th Cir. 1994), which in turn cited this Court's decision in *United States v. Bagley*, 473 U.S. 667, 682 (1985). Killian's contention that the references to *Agurs* and *Bagley* insulate the decision from any *Teague* analysis is specious.

In *Agurs*, this Court did in fact hold that "the knowing use of perjured testimony is fundamentally unfair. . . ." 427 U.S. at 103. Petitioner has no quarrel with this proposition. The problem lies in the fact that the Ninth Circuit expressly premised its decision on a determination that the prosecutor's knowledge of the perjury was irrelevant: "For this case, we assume without deciding that the prosecutor neither knew nor should have known of Masse's perjury. . . ." (Pet.App.A at 6.) The decision then cited the Ninth Circuit's prior decision in *Young* for the proposition that perjury, even absent knowledge by the prosecution, warrants reversal.

Young was decided in 1994, and thus was not in existence in 1988 at the time of finality, and therefore it is irrelevant to the *Teague* bar. Moreover, it fails to establish that a constitutional violation results from the mere presence of perjury absent knowing use by the prosecution. The *Young* opinion first states the rule prohibiting the knowing use of perjured testimony. 17 F.3d at 1203. One page later, however, the opinion announces a different rule:

> Thus, even if the government *unwittingly* presents false evidence, a defendant is entitled to a new trial "if there is a reasonable probability that [without the evidence] the result of the proceeding would have been different." *Endicott*, 869 F.2d at 455 (citing *United States v. Bagley*, 473 U.S. 667, 678-80, 87 L. Ed. 2d 481, 105 S. Ct. 3375 (1985)).

17 F.3d at 1204, emphasis added. *Young* was a direct appeal of a criminal conviction in federal court. In such a posture, the Ninth Circuit may be free to interpret unsettled areas of constitutional law and grant relief as it sees fit. However, *Teague* expressly prohibits the same exercise of power in habeas. And, what is prohibited from being done directly

cannot be accomplished indirectly by simply citing a prior non-habeas case as authority for the new rule being applied in a habeas case. In fact, this Court has recently held that direct appeal cases "are off the table as far as §2254(d) is concerned." *Early v. Packer*, ___ U.S. ___, 123 S.Ct. 362, 366 (2002) (per curiam).

Moreover, neither *United States v. Endicott*, 869 F.2d 452 (9th Cir. 1989) nor *Bagley*, 473 U.S. 667 (1985), the two cases cited by *Young* for its novel restatement of the perjury rule, support *Young's* statement. *Endicott* simply stated that absent knowing use of perjury, new evidence may still be material under *Brady*. *Endicott*, 869 F.2d at 455. Similarly, *Bagley* said nothing about the perjury outside the context of knowing use by the prosecution. *Bagley*, 473 U.S. at 678-680.

The Ninth Circuit's sleight of hand must not be countenanced. Killian acknowledges, albeit grudgingly, that the *Teague* issue was raised, both in the original briefing and on rehearing. (Opp. at 17-18.) The Ninth Circuit flatly refused to address the *Teague* issue, opting instead to cite cases that do not in any way support the rule announced in the decision. Given this Court's stated preference for letting the lower courts "serve as laboratories," Petitioner has asked this Court to grant summary reversal on that issue. However, Petitioner has no objection to this Court taking up the issue and addressing *Teague* in the first instance.

Finally, Petitioner notes that Killian has grossly misstated the state of the law on the issue in question. Killian states that the decision of the court of appeals in this case is not in conflict with any other appellate court. (Opp. at 19.) Killian overlooks the fact that there exist published cases *from every single federal court of appeals in the country* holding that only the prosecutor's *knowing* use of perjury creates constitutional error. (*See* Pet. at 6, n,5.)

III.

THE STATE COURT DENIAL OF RELIEF WAS NOT "CONTRARY TO" CLEARLY ESTABLISHED FEDERAL LAW

The Ninth Circuit found error based on *Doyle v. Ohio*, 426 U.S. 610, 611 (1976) under the "contrary to" clause of 28 U.S.C. § 2254. (Pet.App.A at 12.) Killian acknowledges that ruling and attempts to defend it by arguing that the facts of this case are "materially indistinguishable" from *Doyle*. (Opp. at 23.) However, Killian then engages a lengthy explication of the "cooperation exception" which has been recognized in various federal appellate court decisions, and which is present and applicable in this case. (Opp. at 23-25.) Killian's own argument therefore demonstrates that this case is materially distinguishable from *Doyle*, and therefore, the Ninth Circuit's application of AEDPA was clearly erroneous.

In this case, a primary thrust of Killian's defense at trial was to portray herself as cooperative with police, and therefore innocent. The prosecutor sought to show the jury that her claim of cooperation was not consistent with her behavior, in that she lied to police for several hours, then invoked her right to silence once she realized that her lies were not convincing the police. Since *Doyle* did not involve any facts remotely similar to those in the instant case, the state court decision was not "contrary to" *Doyle*.

Moreover, Killian's argument that the cooperation exception does not apply to this case (*see* Opp. at 24) merely underscores the fact that the state court decision in this case was not "contrary to" federal law as determined by this Court. This Court has never expressly addressed the scope of the cooperation exception, much less rejected its application. In the absence of contrary authority, § 2254(d) "demands that state court decisions be given the benefit of the doubt." *Woodford v. Visciotti*, ___ U.S. ___, 123 S.Ct 357, 360 (2002) (per curiam). Thus, the Ninth Circuit's determination that the exception does

not apply to this case is a prime example of the errant reasoning referenced in *Kibbe v. Dubois*, 269 F.3d 26, 36-37 (1st Cir. 2001)(reversing grant of habeas relief on *Doyle* error because it is not enough for the federal court to merely disagree with the state court).

In a closely related context, this Court has previously indicated that the privilege against self-incrimination is to be used as a shield, and not a sword. *United States v. Robinson*, 485 U.S. 25, 32 (1988) (analyzing propriety of prosecutorial comment on right to silence under *Griffin v. California*, 380 U. S. 609 (1965)). In that same case, this Court observed that "prosecutorial comment must be examined in context." *Robinson*, 485 U.S. at 33. Petitioner submits the cooperation exception was particularly applicable in this case where Killian, a third year law student, attempted to mislead the jury by portraying herself as cooperative during questioning, and by explaining her subsequent invocation as simply "good sound legal advice" that she learned in law school. (Pet.App.D at 57-58.) The prosecutor was entitled to rebut Killian's attempt to portray herself as cooperative before the jury.

IV.

THE NINTH CIRCUIT'S REJECTION OF AEDPA'S DEFERENTIAL STANDARD OF REVIEW CREATES A SPLIT OF AUTHORITY AMONG THE CIRCUITS

Killian attempts to clarify the precise reason for the Ninth Circuit's failure to accord the state court decision any deference on the perjury claim. Regardless of the reason, the Ninth Circuit's failure to accord deference conflicts with the decisions of other circuit courts of appeal. In *Pecoraro v. Walls*, 286 F.3d 439, 443 (7th Cir. 2002), the court noted that the fact that a federal district court holds an evidentiary hearing may "bear on the reasonableness of the state courts' adjudication" but should not alter the deferential standard of review under

AEDPA. Similarly, in *Valdez v. Cockrell*, 274 F.3d 941, 946-47, 951-52 (5th Cir. 2001), the court concluded that even if a federal court grants an evidentiary hearing, its utility is in assessing the reasonableness of the state court determination; the hearing does not justify rejecting the state court determination altogether.

Because the Ninth Circuit's treatment of the perjury claim plainly contravened the mandate of 28 U.S.C. § 2254(d), and because their published decision conflicts with two other circuits, certiorari should be granted.

CONCLUSION

For the foregoing reasons and for the reasons set forth in the Petition for Writ of Certiorari, the Petition for Writ of Certiorari should be granted.

Dated: December 30, 2002

Respectfully submitted,

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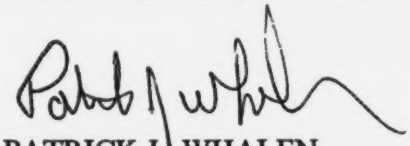

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